

The Honorable James L. Robart

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MICROSOFT CORPORATION, a Washington  
corporation,

Plaintiff,

v.

MOTOROLA, INC., MOTOROLA  
MOBILITY, INC., and GENERAL  
INSTRUMENT CORPORATION.,

Defendants.

CASE NO. C10-1823-JLR

MOTOROLA MOBILITY'S AND  
GENERAL INSTRUMENT'S MOTION TO  
FILE DOCUMENTS UNDER SEAL IN  
SUPPORT OF ITS OPPOSITION TO  
MICROSOFT'S RULE 702 MOTION TO  
PRECLUDE TESTIMONY BY CHARLES  
R. DONOHUE AND DR. R. SUKUMAR

**NOTE ON MOTION CALENDAR:  
September 14, 2012**

MOTOROLA'S MOTION TO FILE DOCUMENTS UNDER  
SEAL IN SUPPORT OF OPPOSITION TO MICROSOFT'S  
MOTION TO PRECLUDE TESTIMONY BY DONOHUE AND  
SUKUMAR  
CASE NO. C10-1823-JLR

SUMMIT LAW GROUP PLLC  
315 FIFTH AVENUE SOUTH, SUITE 1000  
SEATTLE, WASHINGTON 98104-2682  
Telephone: (206) 676-7000  
Fax: (206) 676-7001

**I. INTRODUCTION**

Pursuant to Western District of Washington Civil Local Rule CR 5(g)(2), Defendants Motorola Mobility, Inc. and General Instrument Corporation (collectively “Motorola”) respectfully move this Court for leave to file under seal the following:

1. Exhibits 35-39, 44, 46, 48, 50, 58, and 63-64 to the Second Declaration of Samuel L. Brenner; and
2. Motorola Mobility’s and General Instrument’s Opposition to Microsoft’s Rule 702 Motion to Preclude Testimony by Charles R. Donohoe and Dr. R. Sukumar (“Opposition”).

**II. BACKGROUND**

Microsoft Corporation (“Microsoft”) and Motorola entered into a stipulated Protective Order, which was approved by the Court on July 21, 2011. (Dkt. No. 72.) This Protective Order outlines categories of material that should be maintained in confidence, along with procedures for sealing confidential material when included in documents filed with the Court. Specifically, paragraph 1 specifies that:

Confidential Business Information is information which has not been made public and which concerns or relates to the trade secrets ... amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or other organization, the disclosure of which information is likely to have the effect of causing substantial harm to the competitive position of the person, firm, partnership, corporation, or other organization from which the information was obtained....

*Id.* at 1-2. This information should be marked as “CONFIDENTIAL BUSINESS INFORMATION, SUBJECT TO PROTECTIVE ORDER.” *Id.* at 2. Additionally, paragraph 6 specifies that:

(1) Confidential Business Information pertaining to licensing or other commercially sensitive financial information shall not be made available under this paragraph 6 to such designated in-house counsel; the supplier shall designate such Confidential Business Information pertaining to licensing or other commercially sensitive financial information as “[SUPPLIER’S NAME] CONFIDENTIAL FINANCIAL INFORMATION – OUTSIDE ATTORNEYS’ EYES ONLY – SUBJECT TO PROTECTIVE ORDER” and promptly provide a redacted version of such document that may be disseminated to the two in-house counsel designated under this paragraph 6....

1 *Id.* at 4. Finally, Paragraph 2 of the Protective Order governs the sealing of documents, and states  
 2 in relevant part that:

3 During the pre-trial phase of this action, such information, whether submitted in  
 4 writing or in oral testimony, shall be disclosed only *in camera* before the Court  
 5 and shall be filed only under seal, pursuant to Rule 5(g) of the Local Civil Rules  
 6 of the United States District Court for the Western District of Washington.

7 *Id.* at 2.

8 Thus, the Protective Order provides that Motorola may request to seal documents by  
 9 formal motion pursuant to Rule 5(g) of the Local Civil Rules of the Western District of  
 10 Washington. Local Rule CR 5(g)(3) states that:

11 If a party seeks to have documents filed under seal and no prior order in the case  
 12 or statute specifically permits it, the party must obtain authorization to do so by  
 13 filing a motion to seal or a stipulation and proposed order requesting permission  
 14 to file specific documents under seal. The court will allow parties to file entire  
 15 memoranda under seal only in rare circumstances. A motion or stipulation to seal  
 16 usually should not itself be filed under seal. A declaration or exhibit filed in  
 17 support of the motion to seal may be filed under seal if necessary. If possible, a  
 18 party should protect sensitive information by redacting documents rather than  
 19 seeking to file them under seal. A motion or stipulation to seal should include an  
 20 explanation of why redaction is not feasible.

21 Similarly, federal law recognizes that courts should protect trade secrets or other  
 22 confidential commercial information by reasonable means, permitting the filing under seal of  
 23 documents containing such information. *See* Fed. R. Civ. P. 26(c)(1)(G) and (H) (stating that a  
 24 court may require that (1) “a trade secret or other confidential research, development, or  
 25 commercial information not be revealed or be revealed only in a specified way” and (2) “the  
 26 parties simultaneously file specified documents or information in sealed envelopes...”).

Though courts recognize a general right to inspect and copy public records and documents,  
 including judicial records, the United States Supreme Court has stated that this right is limited.  
 “[T]he right to inspect and copy judicial records is not absolute. Every court has supervisory  
 power over its own records and files, and access has been denied where court files might have  
 become a vehicle for improper purposes.” *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598

(1978). In discussing examples of improper purposes, the Court indicated that courts are not to serve as “sources of business information that might harm a litigant’s competitive standing.” *Id.*

As the Ninth Circuit stated:

The law, however, gives district courts broad latitude to grant protective orders to prevent disclosure of materials for many types of information, including, but not limited to, trade secrets or other confidential research, development, or commercial information. See Fed. R. Civ. P. 26(c)(7). Rule 26(c) authorizes the district court to issue “any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden.” The Supreme Court has interpreted this language as conferring “broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required.” *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984).

*Phillips v. General Motors Corp.*, 307 F.3d 1206, 1211 (9th Cir. 2002).

### **III. THE PROTECTIVE ORDER BOTH PERMITS AND REQUIRES MOTOROLA TO FILE THIS MOTION FOR LEAVE TO SEAL**

In accordance with the Protective Order and the above-referenced authority, Motorola moves to file the following documents under seal for the stated reasons:

#### **A. Exhibits 35-39, 44, 46, 48, 50, 58, and 63-64 to the Second Declaration of Samuel L. Brenner**

Exhibit 35 is a true and correct copy of the July 24, 2012 Expert Report of Motorola expert Richard Schmalensee. Exhibit 36 is a true and correct copy of the August 10, 2012 Expert Rebuttal Report of Richard Schmalensee. Both reports are designated “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” and contain highly confidential information about Microsoft and Motorola business and licensing practices and history. Disclosure of this information to third parties and other party employees not covered by the protective order would have the potential to lead to competitive harm. Accordingly, Exhibits 35 and 36 should be sealed in their entirety.

Exhibit 37 is a true and correct copy of the transcript of the deposition of Timothy S. Simcoe, Ph.D., which was taken under oath in Boston, Massachusetts, on August 29, 2012. By agreement of the parties, that transcript has been designated as “CONFIDENTIAL.” During his deposition, Dr. Simcoe testified extensively regarding the content of both his opening and rebuttal

1 expert reports, which Microsoft has designated in their entirety "ATTORNEYS' EYES ONLY  
2 SUBJECT TO PROTECTIVE ORDER." Accordingly, under the terms of the Protective Order,  
3 Motorola is required to file Exhibit 37 under seal.

4 Exhibit 38 is a true and correct copy of the transcript of the deposition of Matthew R.  
5 Lynde, Ph.D., which was taken under oath in San Francisco, California, on August 31, 2012. That  
6 transcript has been designated "CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER." At  
7 his deposition, Dr. Lynde testified extensively regarding the content of both his opening and  
8 rebuttal expert reports, which Microsoft has designated in their entirety as  
9 "MICROSOFT/MOTOROLA CONFIDENTIAL BUSINESS INFORMATION OUTSIDE  
10 ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER." Both Dr. Lynde's  
11 testimony and the expert reports referenced extensively throughout the course of his deposition  
12 disclose highly confidential Motorola and Microsoft information relating to business and licensing  
13 practices and history. Disclosure of this information to third parties and other party employees not  
14 covered by the protective order would have the potential to lead to competitive harm.  
15 Accordingly, Exhibit 38 should be sealed in its entirety.

16 Exhibit 39 is a true and correct copy of the transcript of the deposition of Kevin M.  
17 Murphy, which was taken under oath in Chicago, Illinois, on August 31, 2012, selected pages of  
18 which were submitted to the Court as Exhibit 21 to the Declaration of Samuel L. Brenner,  
19 submitted on August 27, 2012, (Dkt. No. 392). This transcript has been designated as "HIGHLY  
20 CONFIDENTIAL." During his deposition, Dr. Murphy testified extensively regarding the content  
21 of both his opening and rebuttal expert reports, which Microsoft has designated in their entirety  
22 "ATTORNEYS' EYES ONLY SUBJECT TO PROTECTIVE ORDER." Moreover, during his  
23 deposition, Dr. Murphy discussed confidential information about Microsoft's and Motorola's  
24 business and licensing practices and licensing history. Disclosure of this information to third  
25 parties and other party employees not covered by the protective order would have the potential to  
26

1 lead to competitive harm. Due to presence of this highly confidential information throughout the  
2 transcript, Exhibit 39 should be sealed in its entirety.

3 Exhibit 44 is a true and correct copy of an internal October 7, 2011 Motorola email,  
4 forwarding an October 7, 2011 email, and bearing production number  
5 MOTM\_WASH1823\_0393114. This email, which has been marked "CONTAINS  
6 CONFIDENTIAL BUSINESS INFORMATION, SUBJECT TO PROTECTIVE ORDER,"  
7 contains highly confidential business information relating to the licensing practices and history of  
8 both Motorola and a non-party to this litigation. Disclosure of this information to third parties and  
9 other party employees not covered by the protective order would have the potential to lead to  
10 competitive harm. Accordingly, Exhibit 44 should be sealed in its entirety.

11 Exhibit 46 is a true and correct copy of the August 10, 2012 Rebuttal Report of Matthew  
12 R. Lynde, Ph.D., Pursuant to Rule 26(a)(2)(B). The report, which is designated as  
13 "MICROSOFT/MOTOROLA CONFIDENTIAL BUSINESS INFORMATION OUTSIDE  
14 ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER," contains highly  
15 confidential Motorola and Microsoft information relating to business and licensing practices and  
16 history. Disclosure of this information to third parties and other party employees not covered by  
17 the protective order would have the potential to lead to competitive harm. Accordingly, Exhibit  
18 46 should be sealed in its entirety.

19 Exhibit 48 is a true and correct copy of the transcript of the deposition of Ramamirtham  
20 Sukumar, which was taken under oath in New York, New York, on August 28, 2012. This  
21 deposition transcript has been marked "CONFIDENTIAL," however Motorola does not believe  
22 that the transcript contains any confidential information. Under the terms of the Protective Order,  
23 Motorola is required to file Exhibit 48 under seal. However, should Microsoft agree that the  
24 transcript does not contain any confidential information, Motorola is ready to file a replacement  
25 redacted version of the Opposition, which will not include redactions of references to Exhibit 48.

1 Exhibit 50 is a true and correct copy of the August 10, 2012 Rebuttal Expert Report of  
2 Charles R. Donohoe. This report, which is designated as "CONTAINS CONFIDENTIAL  
3 FINANCIAL INFORMATION – OUTSIDE ATTORNEYS' EYES ONLY – SUBJECT TO  
4 PROTECTIVE ORDER," includes an examination of, and discloses, confidential and non-public  
5 financial and business information relating to both Microsoft and Motorola, and relating to  
6 licensing and business practices and history. Disclosure of this information to third parties and  
7 other party employees not covered by the protective order would have the potential to lead to  
8 competitive harm. Accordingly, Exhibit 50 should be sealed in its entirety.

9 Exhibit 58 is a true and correct copy of a document entitled "IT Pro Pulse March 2009  
10 Worldwide Analysis," bearing production numbers MS-MOTO\_1823\_00005092555-682. This  
11 document, which has been marked "MICROSOFT -- CONFIDENTIAL BUSINESS  
12 INFORMATION -- SUBJECT TO PROTECTIVE ORDER, was marked as Exhibit 8 to the  
13 deposition of Peter E. Rossi, which was taken under oath in San Francisco, California, on August  
14 30, 2012. This document contains confidential consumer survey that Microsoft commissioned  
15 regarding awareness, satisfaction, and use of Microsoft operating systems. Disclosure of this  
16 information to third parties and other party employees not covered by the protective order would  
17 have the potential to lead to competitive harm. Due to presence of this highly confidential  
18 information, Exhibit 58 should be sealed in its entirety.

19 Exhibit 63 is a true and correct copy of the August 10, 2012 Rebuttal Expert Report of  
20 Roger S. Smith, which has been marked "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES  
21 ONLY." This report includes an examination of, and discloses, confidential and non-public  
22 financial and business information relating to both Microsoft and Motorola, and relating to  
23 licensing and business practices and history. Disclosure of this information to third parties and  
24 other party employees not covered by the protective order would have the potential to lead to  
25 competitive harm. Accordingly, Exhibit 63 should be sealed in its entirety.



Exhibit 64 is a true and correct copy of the September 2011 Patent License Agreement between Microsoft Corporation and Samsung Electronics Co. Ltd., bearing production numbers MS-MOTO\_1823\_00002244552-575. This license agreement is a highly confidential agreement between Microsoft and Samsung, a non-party to this litigation, and has been marked by Microsoft as "CONFIDENTIAL BUSINESS INFORMATION, SUBJECT TO PROTECTIVE ORDER." Although the agreement indicates that the parties may disclose its existence to third parties, the terms of the agreement were kept in confidence. Disclosure of this information to third parties and other party employees not covered by the protective order would have the potential to lead to competitive harm. Due to presence of this highly confidential information throughout the license, Exhibit 64 should be sealed in its entirety.

**B. Motorola Mobility's and General Instrument's Opposition to Microsoft's Rule 702 Motion to Preclude Testimony by Charles R. Donohoe and Dr. R. Sukumar**

Motorola respectfully requests that its Opposition be filed under seal because of extensive citation to, and description of: (1) expert reports filed in this action by Microsoft's expert witnesses, which Microsoft has designated as "MICROSOFT/MOTOROLA CONFIDENTIAL BUSINESS INFORMATION OUTSIDE ATTORNEY'S EYES ONLY – SUBJECT TO PROTECTIVE ORDER"; (2) expert reports filed in this action by Motorola's expert witnesses, which Motorola has designated as "HIGHLY CONFIDENTIAL – ATTORNEY'S EYES ONLY"; (3) confidential deposition testimony from this action; (4) confidential internal Motorola documents; and (5) confidential Microsoft internal documents. Because this information is contained in the Opposition, and in accordance with its responsibilities under the Protective Order, Motorola has marked this document as containing "OUTSIDE ATTORNEYS' EYES ONLY – SUBJECT TO PROTECTIVE ORDER." In lieu of sealing the entire Opposition, Motorola has redacted only those portions of its brief that disclose this confidential information. While redactions were made to limit as little information as possible, leaving the remainder available for public review, given the subject matter of the Opposition, which responds to Microsoft's critiques



of the methodologies used by Motorola experts Charles Donohoe and and Dr. R. Sukumar, large portions of the Motion have been redacted.

**IV. CONCLUSION**

For the foregoing reasons, Motorola respectfully requests that this Court order that the following documents be filed under seal:

1. Exhibits 35-39, 44, 46, 48, 50, 58 and 63-64 to the Second Declaration of Samuel L. Brenner; and
2. Motorola Mobility's and General Instrument's Opposition to Microsoft's Rule 702 Motion to Preclude Testimony by Charles R. Donohoe and Dr. R. Sukumar.

DATED this 5th day of September, 2012.

SUMMIT LAW GROUP PLLC

By /s/ Ralph H. Palumbo

Ralph H. Palumbo, WSBA #04751

Philip S. McCune, WSBA #21081

Lynn M. Engel, WSBA #21934

*ralphp@summitlaw.com*

*philm@summitlaw.com*

*lynne@summitlaw.com*

By /s/ Thomas V. Miller

Thomas V. Miller

MOTOROLA MOBILITY, INC.

MD W4-150

600 North U.S. Highway 45

Libertyville, IL 60048-1286

(847) 523-2162

And by

Jesse J. Jenner (*pro hac vice*)  
Steven Pepe (*pro hac vice*)  
Kevin J. Post (*pro hac vice*)  
Ropes & Gray LLP  
1211 Avenue of the Americas  
New York, NY 10036-8704  
(212) 596-9046  
*jesse.jenner@ropesgray.com*  
*steven.pepe@ropesgray.com*  
*kevin.post@ropesgray.com*

James R. Batchelder (*pro hac vice*)  
Norman H. Beamer (*pro hac vice*)  
Ropes & Gray LLP  
1900 University Avenue, 6<sup>th</sup> Floor  
East Palo Alto, CA 94303-2284  
(650) 617-4030  
*james.batchelder@ropesgray.com*  
*norman.beamer@ropesgray.com*

Paul M. Schoenhard (*pro hac vice*)  
Ropes & Gray LLP  
One Metro Center  
700 12<sup>th</sup> Street NW, Suite 900  
Washington, DC 20005-3948  
(202) 508-4693  
*paul.schoenhard.@ropesgray.com*

***Attorneys for Motorola Solutions, Inc., Motorola  
Mobility, Inc., and General Instrument Corp.***

**CERTIFICATE OF SERVICE**

I hereby certify that on this day I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Arthur W. Harrigan, Jr., Esq.  
Christopher T. Wion, Esq.  
Shane P. Cramer, Esq.  
Calfo Danielson, Harrigan, Leyh & Eakes LLP  
*arthurh@calfoharrigan.com*  
*chrisw@calfoharrigan.com*  
*shanec@calfoharrigan.com*

Richard A. Cederroth, Esq.  
Brian R. Nester, Esq.  
David T. Pritikin, Esq.  
Douglas I. Lewis, Esq.  
John W. McBride, Esq.  
David Greenfield, Esq.  
William H. Baumgartner, Jr., Esq.  
David C. Giardina, Esq.  
Carter G. Phillips, Esq.  
Constantine L. Trela, Jr., Esq.  
Ellen S. Robbins, Esq.  
Nathaniel C. Love, Esq.  
Sidley Austin LLP  
*rcederroth@sidley.com*  
*bnester@sidley.com*  
*dpritikin@sidley.com*  
*dilewis@sidley.com*  
*jwmcbride@sidley.com*  
*david.greenfield@sidley.com*  
*wbaumgartner@sidley.com*  
*dgiardina@sidley.com*  
*cphillips@sidley.com*  
*ctrela@sidley.com*  
*erobbins@sidley.com*  
*nlove@sidley.com*

T. Andrew Culbert, Esq.  
David E. Killough, Esq.  
Microsoft Corp.  
*andycu@microsoft.com*  
*davkill@microsoft.com*

DATED this 5th day of September, 2012.

/s/ Marcia A. Ripley

Marcia A. Ripley